UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD G. THOMAS, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER SF07528310646 DATE: SEP 17 1987

Michael J. Kelley, Burbank, California, for the appellant.

Richard J. Brennan, Fort Ord, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Chairman Levinson issues a separate concurring opinion.

OPINION AND ORDER

Appellant petitions for review of an initial decision sustaining his removal for failing to maintain membership in the United States Army Reserve (USAR). For the reasons set forth in this opinion, appellant's petition for review is GRANTED, the initial decision is AFFIRMED as MODIFIED, and the agency action is SUSTAINED.

BACKGROUND

Appellant was removed from his position of USAR Unit Administrator for failing to meet a condition of employment in that his membership in the USAR was revoked for reasons within his control. The agency specified that appellant was discharged from the USAR under other than honorable conditions pursuant to the findings and recommendations of a Board of Officers which conducted a hearing on various charges of misconduct by appellant. Appellant appealed the removal to the Board's San Francisco Regional Office.

Following a hearing, the administrative judge found that appellant lost his membership in the USAR for reasons within his control and that loss of such membership warranted his removal since USAR membership was a condition of employment. In reaching this conclusion, the administrative judge found that appellant had a fair opportunity to defend himself before the Board of Officers against the charges of misconduct which led to his discharge from the USAR, and that the doctrine of collateral estoppel precluded relitigation of those charges before the Board.

In his petition for review, appellant contends the following: (1) His military discharge was not for reasons within his control because the charges against him were invalid and collateral estoppel should not preclude litigation of these charges before the Board; (2) he did not receive a fair opportunity to defend himself in the prior military proceeding; and (3) the administrative judge erred

by excluding evidence on a discrimination claim which appellant first raised one week prior to the hearing.

ANALYSIS

In cases where employees are removed from their civilian positions for failing to meet the condition of employment of maintaining reserve military status, the Board's scope of review is limited to determining whether the loss of membership was due to circumstances within the appellant's control. *See Zimmerman v. Department of the Army*, 755 F.2d 156 (Fed. Cir. 1985); *Jacobs v. Department of the Air Force*, 29 M.S.P.R. 76 (1985); *McClanahan v. Department of the Army*, 2 M.S.P.R. 403 (1980).

The Federal Circuit has held that the Board does not have authority to review the merits of the military decision to revoke appellant's reserve status. *See Zimmerman*, 755 F.2d at 157. The only issues that the Board may properly consider are: (1) Whether the position occupied contains a requirement that the incumbent possess such status; (2) whether appellant lost reserve status; (3) whether minimal due process was granted by the military; and (4) whether the loss was within the appellant's control. The administrative judge found that the question of whether the acts of misconduct were within appellant's control was decided by the Board of Officers and relitigation of that issue before this Board was not required under the doctrine of collateral estoppel. We disagree.

Under the doctrine of collateral estoppel, the judgment on the merits in one suit precludes the relitigation of the same issues in a second suit, regardless of whether the first and second suits were based on the same cause of action. As the Board recognized in *Chisholm v. Defense Logistics Agency*, 3 M.S.P.R. 171 (1980), *remanded on other grounds*, 656 F.2d 42 (3rd Cir. 1981), it may apply collateral estoppel to any issues previously adjudicated, assuming the prerequisites for the doctrine exist. *See also Graybill v. United States Postal Service*, 782 F.2d 1567, 1570-73 (Fed. Cir. 1986), *cert. denied*, 107 S.Ct. 462 (1986).

For collateral estoppel to apply, the issue in the second suit must be identical to that involved in the prior action, the issue must have been actually litigated in the prior action, and the determination in the prior action must have been necessary to the resulting judgment. *See Chisholm* at 175. In the present case, the requirement of identical issues has not been satisfied. The military Board of Officers determined whether appellant committed the charged conduct. The issue we must decide, however, is whether appellant's loss of reserve status was for reasons within his control. Thus, collateral estoppel does not apply and the Board will examine the issue of whether appellant's loss of reserve status was within his control.

For the following reasons, we find that, because positions such as appellant's exist by agreement between the

Office of Personnel Management (OPM) and the agency, whether a reason for losing membership in the reserve is considered "within one's control" is not to be determined according to the standards of everyday usage. *In Buriani v. Department of the Air Force*, 777 F.2d 674 (Fed. Cir. 1985), the United States Court of Appeals for the Federal Circuit confronted the question of whether a reservist's failure to be promoted was beyond his control. The court noted that the Air Force's regulations specifically included failure to attain promotion. The court conceded that "[i]n a layman's sense, the regulation may not represent the perceived realities of the situation," but found that it represented the "determination of the agency and OPM that all failures to achieve ... promotion ... fall within the employee's control." *Id.* at 677 (emphasis in the original). Thus, the court held that the employee could not defend against his removal by attempting to show that his failure to be promoted was not within his control.

In the present case, however, there is no regulation in the record specifying what circumstances are considered "within one's control." In circumstances such as these, we find that, where an agency regulation concerning loss of reserve status does not define the circumstances which are considered to be within an employee's control, and where such status is a condition of employment, all circumstances are within the employee's control except for age and physical disability. We find this definition consistent

with the purpose underlying the establishment of the Army Reserve Technician (ART) program, and prior Civil Service Commission (CSC) and judicial interpretation.

In 1960, the CSC approved the Army's proposal for establishing the ART program. The program's main goal was to achieve maximum combat readiness of the Army's reserve units. Membership in the reserve was, therefore, made a condition of civilian employment. Membership in the reserve, however, requires satisfying certain age and physical standards. These standards have been found to be rationally related to the reserve's combat mission as well as contribute to the effective performance of the ART employees' duty of maintaining themselves in a position to increase the combat readiness and effectiveness of the reserve units. *See American Federation of Government Employees v. Hoffman*, 543 F.2d 930, 935-36, 945 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 965 (1977).

A memorandum of understanding appended to the CSC's letter of approval of the Army's ART program included the Army's promise that the lack or involuntary loss of military status would not provide a basis for removing present or future employees. *Id.* at 935. In deciding cases involving removal of ART employees, the CSC's policy contemplated that membership in the active reserve constituted a condition of employment, and loss of active reserve membership for military reasons within the employee's control provides the basis for a removal action. *See Rolles v. Civil Service*

Commission, 512 F.2d 1319, 1331-32 (D.C. Cir. 1975) (Robb, J., dissenting). The CSC defined "within one's control," within the meaning of this policy, to be reasons other than age or physical disability. *Id.* Since the underlying purpose of the creation of the ART program has not changed, we find the definition of the "within one's control" requirement employed by the CSC to be equally valid now.*

In light of our conclusion on this issue, we find that the administrative judge's error in the collateral estoppel issue does not denigrate appellant's substantive rights. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981). Appellant asserts that he lacked the mental capacity to be responsible for the actions he may have taken which led to the loss of reserve status. This contention, however, does not relate to his age or physical condition and is, therefore beyond our scope of review. While an argument could be made that a distinction should not be drawn between emotional ills and physical maladies, as discussed above, appellant's position owes its existence to an agreement between the agency and OPM, rather than a statutory mandate, and the Board should neither rewrite the agreement between the parties nor supplant the judgment of OPM and the military as to precisely when an employee shall

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* While physical disability is generally considered beyond an employee's control, the agency may attempt to prove that the disability is within the employee's control under the circumstances of a particular case. *See Schaffer v. Department of the Air Force*, 9 M.S.P.R. 305 (1981).

be deemed to lose reserve membership for reasons within his control.

Appellant also contends that he did not receive a fair opportunity to defend himself in the prior military proceeding. The record reflects, however, that appellant was afforded minimal due process protections, and therefore while appellant's contentions regarding that proceeding may be presented within the military judicial system, they will not be considered further by the Board.

Finally, appellant contends that the administrative judge improperly dismissed his claim of discrimination at the hearing and excluded evidence in support of that claim. The Board has previously found, however, that because of the generally limited nature of its review of the military decision regarding reserve status, once the Board has considered whether the agency proved the revocation of reserve status and the appellant's ability to control the underlying justification, the Board will not consider affirmative defenses relating to the military action. *See Buriani v. Department of the Air Force*, 29 M.S.P.R. 226 (1984), *aff'd on other grounds*, 777 F.2d 674 (Fed. Cir. 1985); *Schaffer* at 309-310 (1981). Thus the administrative judge properly dismissed appellant's claim of discrimination.

This is the final Order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

SEPARATE OPINION OF CHAIRMAN DANIEL R. LEVINSON CONCURRING

I concur fully in the majority's conclusions and, with one exception, with their reasoning as well. While I agree that the administrative judge properly dismissed appellant's affirmative defense of handicap discrimination, because this claim was untimely, I would not reach the question of whether the limited nature of our review of military actions bars us from considering it.

Appellant did not allege discrimination on the basis of handicap until one week before the hearing in this case. "Amendment Of Petition For Appeal To Allege Affirmative Defense Of Discrimination," Initial Appeal File, Tab 9. Under the Board's regulations, an allegation of discrimination can be raised after the petition is filed only if the appellant "did not know of the existence of a basis for the allegation at the time the petition for appeal was filed."* 5 C.F.R. § 1201.155(a); *Abatecola v. Veterans Administration*, 29 M.S.P.R. 601 (1986), *aff'd*, 802 F.2d 471 (Fed. Cir. 1986) (Table). It is clear, however, from the allegations in appellant's pleading that he knew of the

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* *Roberts v. Defense Logistics Agency*, 3 M.S.P.R. 537 (1980), does not hold, as appellant suggests, that discrimination claims raised at or before the hearing are always timely. Indeed, the agency in that case does not even appear to have challenged the timeliness of the claim, but, pleading surprise, sought to introduce additional evidence. Moreover, nothing in that brief opinion indicates when the appellant became aware of the basis for her claim. Thus, she may well not have been aware of it until after she filed her appeal.

basis for his claim when he filed the petition. For in it, he alleged that the Army was aware of his "behavioral problems and of two previous military hospitalizations due to emotional impairment." Obviously, appellant was as aware of this as the Army. Thus, his attempt to raise the affirmative defense of handicap discrimination some seven months after filing his petition was untimely.

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Daniel R. Levinson
Chairman